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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JANE MAYER, Plaintiff and Respondent, v. JOSEPH WEISZ et al., Defendants and Appellants.	B207194 (Los Angeles County Super. Ct. No. SS015290)

APPEAL from a judgment of the Superior Court of Los Angeles County, Allan J. Goodman, Judge. Affirmed.

Klika, Parrish & Bigelow and Franklin T. Bigelow, Jr., for Defendants and Appellants.

Hamburg, Karic, Edwards & Martin**,** Gregg A. Martin and Ryan T. Koczara for Plaintiff and Respondent.

I. INTRODUCTION

Defendants, Joseph A. Weisz and Halina M. Karpinski, appeal from a judgment confirming an arbitration award in favor of plaintiff, Jane Mayer. Defendants contend the arbitrator exceeded his powers. (Code Civ. Proc., § 1286.2, subd. (a)(4).) (All further statutory references are to the Code of Civil Procedure except where otherwise indicated.) We affirm the judgment.

II. BACKGROUND

This appeal arises out of a dispute between neighboring landowners. The underlying action (*Mayer v. Weisz* (Super. Ct. L.A. County, 2006, No. SC084229)) ended in mediation and a January 25, 2006 settlement agreement. Plaintiff dismissed the underlying action on February 14, 2006.

Pursuant to the settlement agreement, the parties agreed, subject to specified conditions, that: plaintiff would construct a wall on her property; defendants would have a recordable license to use a portion of plaintiff's property for landscaping; defendants would pay plaintiff $105,000; "[t]he parties shall execute a further settlement agreement including a subject matter release with [Civil Code section] 1542 waivers pertaining to the subject matter (as defined in the settlement agreement) each side to bear own costs"; defendants could maintain bougainvillea or other plants along a rear fence at the property line; defendants would allow an alleged encroachment to remain "in status quo"; and the parties would cooperate in the preparation of documents necessary to effectuate the settlement agreement. The parties mutually released and waived any prescriptive rights in each other's property. The settlement agreement included an arbitration provision: "The parties agree that Dennis Torres shall arbitrate any dispute between the parties arising out of or in connection with this agreement or the Action. The parties shall equally share the costs of the arbitrator's fees (and any related costs (but not attorneys fees)[)]. Mr. Torres shall have discretion to allocate the arbitration costs upon an award

or settlement. In the event that Mr. Torres is unavailable to serve as arbitrator, the parties agree to first try to select a mutually acceptable alternative arbitrator and, if either determines that an agreement cannot be reached, the matter will be submitted to ADR Services and ADR Services will appoint an arbitrator from its existing panel. Each side to bear own attorney fees in the event of any dispute arising out of this agreement. Other than an exchange of documents, there shall be no discovery."

Further disputes subsequently arose. On April 11, 2007, plaintiff filed a petition to compel arbitration. Following extensive briefing, the trial court, on July 20, 2007, granted the petition. The trial court "retain[ed] jurisdiction" over the proceeding. The matter proceeded to arbitration. The arbitrator, Mr. Torres, issued a September 26, 2007 award. The arbitrator found the settlement agreement was an enforceable contract. Further, the arbitrator found defendants breached the settlement agreement by engaging in specified conduct. The arbitrator awarded plaintiff damages and declaratory and injunctive relief.

Plaintiff filed a petition to confirm the arbitration award. Defendants filed a petition to vacate the award. On January 16, 2008, the trial court ruled as follows: "Notwithstanding [defendants'] efforts to avoid their agreement to submit this neighbor versus neighbor dispute to binding arbitration, in September 2007 the matter was arbitrated pursuant to an order of this Court. In his award, the arbitrator took care to note, among other things, numerous disingenuous (if not dishonest) positions taken by [defendants] at the arbitration. [Plaintiff] has moved to confirm the arbitration award in her favor. As they threatened to do before the arbitration even took place, [defendants] seek to have the Court vacate the award. [¶] The only grounds for vacating an arbitration award are listed in section 1286.2, as to which the party seeking to vacate the award . . . bears the burden of proof. [Citations.] [Defendants], who have accused the arbitrator of having committed over a dozen different wrongs, have not carried that burden. They do not cogently set forth any basis for vacating the award under section 1286.2. [Defendants] have taken a shotgun, conclusory, and often confusing approach to their arguments, sometimes failing to cite to any controlling law, or simply ignoring the

applicable law . . . . Further, [defendants] have set forth in their brief arguments previously rejected by this Court (regarding the arbitrator's alleged conflicts and his alleged failure to disclose the alleged conflicts) when on [August 20, 2007] it denied [defendants'] meritless, bad faith motion for reconsideration. Among other reasons, these parties specifically agreed to this arbitrator and the dispute recently arbitrated by him is pursuant to all parties' agreement that he arbitrate disputes arising out of the original Award. The belated attempts to disqualify him were properly rejected. [¶] In light of the history of this matter in all of its aspects, there is no merit to any of the claims asserted under the narrowly-defined circumstances set forth in [section] 1286.2." The judgment confirming the arbitration award was entered on January 16, 2008. This appeal followed.

III. DISCUSSION

There is a very limited judicial review of arbitrator's decisions. Our Supreme Court has held: "[B]oth because it vindicates the intentions of the parties that the award be final, and because an arbitrator is not ordinarily constrained to decide according to the rule of law, it is the general rule that, 'The merits of the controversy between the parties are not subject to judicial review.' [Citations.] More specifically, courts will not review the validity of the arbitrator's reasoning. [Citations.] Further, a court may not review the sufficiency of the evidence supporting an arbitrator's award. [Citations.] [¶] Thus, it is the general rule that, with narrow exceptions, an arbitrator's decision cannot be reviewed for errors of fact or law." (*Moncharsh* v. *Heily & Blase* (1992) 3 Cal.4th 1, 11; accord, *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 981-982.) Further, our Supreme Court has held: "[C]ourts will '"indulge every intendment to give effect to such proceedings."' [Citations.]" (*Moncharsh* v. *Heily & Blase*, *supra*, 3 Cal.4th at p. 9; accord, *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830.)

Defendants rely on a statutory exception to the general rule that an arbitrator's decision is not subject to judicial review. Section 1286.2 states in part: "(a) Subject to Section 1286.4 [setting forth procedural conditions to vacation of an award], the court

shall vacate the award if the court determines any of the following: [¶] . . . [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted." Defendants argue the arbitrator exceeded his authority by deciding particular controversies. Specifically, defendants assert the arbitrator was limited to deciding the five arbitrable controversies discussed in plaintiff's petition to compel arbitration. That assertion is without merit. The scope of the arbitration was controlled by the parties' agreement. (*Vandenberg v. Superior Court, supra,* 21 Cal.4th at p. 830; *Moncharsh v. Heily & Blase, supra,* 3 Cal.4th at p. 8; *Azteca Const., Inc. v. ADR Consulting, Inc.* (2004) 121 Cal.App.4th 1156, 1164.) Here, the arbitration agreement was clear and very broad, "The parties agree that Dennis Torres shall arbitrate *any dispute* between the parties *arising out of or in connection with* this agreement *or the Action*." (Italics added.) (W*agner Const. Co. v. Pacific Mechanical Corp.* (2007) 41 Cal.4th 19, 26; *EFund Capital Partners v. Pless* (2007) 150 Cal.App.4th 1311, 1322.) Defendants have not shown the arbitrator decided any dispute that did not arise out of or in connection with the settlement agreement or the underlying action.

Defendants further contend the arbitrator exceeded his powers by awarding certain remedies—unjust enrichment, diminution in value, loss of use, personal injury and other damages, and injunctive relief. Defendants assert the remedies: had no contractual basis; were not asserted in plaintiff's initial complaint; were not one of the five arbitrable controversies plaintiff identified in her petition to compel arbitration; and were not provided for in the arbitration order. The Supreme Court has held, "[A]rbitrators, unless expressly restricted by the agreement or the submission to arbitration, have substantial discretion to determine the scope of their contractual authority to fashion remedies." (*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376; *Taylor v. Van-Catlin Const.* (2005) 130 Cal.App.4th 1061, 1066.) Absent specific restrictions in the agreement to arbitrate or the applicable arbitration rules—and there are none here—an arbitrator does not exceed his or her powers in fashioning a remedy so long as it bears a rational relationship to the underlying contract and its breach. (*Moshonov v. Walsh* (2000) 22 Cal.4th 771, 777; *Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th

at pp. 367, 381; *County of Solano v. Lionsgate Corp.* (2005) 126 Cal.App.4th 741, 748.) The Supreme Court has further held: "Arbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. [Citation.] The remedy awarded, however, must bear some rational relationship to the contract and the breach. . . . [¶] The award will be upheld so long as it was even arguably based on the contract; it may be vacated only if the reviewing court is *compelled* to infer the award was based on an extrinsic source. [Citations.] In close cases the arbitrator's decision must stand. [Citation.]" (*Advanced Micro Devices, Inc. v. Intel Corp., supra*, 9 Cal.4th at p. 381; see *Delaney v. Dahl* (2002) 99 Cal. App.4th 647, 655.) Defendants have not shown a lack of a rational relationship between the settlement agreement and the remedies employed.

Additionally, defendants improperly argue the arbitrator erroneously resolved factual disputes. As noted above, it is the general rule that the arbitrator's resolution of factual issues is not subject to judicial review. (*Moncharsh* v. *Heily & Blase, supra*, 3 Cal.4th at p. 11; *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1090-1091.) Thus, no purported factual errors on the arbitrator's part are a basis for setting aside any part or all of the arbitrators award.

Defendants contend the trial court improperly delegated to the arbitrator the question whether the settlement agreement was an enforceable contract. Defendants rely, indirectly, on authority for the proposition that a court decides, as a threshold matter, whether the arbitration agreement encompasses a particular dispute; that is, whether the parties agreed to arbitrate a particular controversy. These are two different questions. Defendants do not cite any authority for the proposition an arbitrator cannot decide whether an agreement is an enforceable contract. Defendants have not established any improper delegation. A court must grant substantial deference to an arbitrator's own assessment of his or her contractual authority. (*Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th at pp. 372-373; *Taylor v. Van-Catlin Const., supra,* 130 Cal.App.4th at pp. 1065-1066.) Our Supreme Court has held, "[A] court [must] refrain from substituting its own judgment for the arbitrator's in determining the contractual

scope of those powers." (*Advanced Micro Devices, Inc. v. Intel Corp., supra,* 9 Cal.4th at p. 372; see *Jones v. Humanscale Corp*. (2005) 130 Cal.App.4th 401, 414.) Defendants have not shown any reason to question the arbitrator's determination he had authority to decide whether the settlement agreement was an enforceable contract.

Finally, defendants assert the arbitration award was "tainted" by the arbitrator's conduct of the arbitration. Defendants describe the arbitrator's purported misconduct as "ultimately of secondary significance," but "constitut[ing] additional grounds for vacating" the award under section 1286.2, subdivisions (a)(5) and (6). Defendants argue in conclusory fashion that Mr. Torres: failed to make mandatory disclosures "including, but not limited to" that he had ex parte communications with plaintiff's counsel; refused to disqualify himself after he obtained confidential information from the parties while serving as mediator in this matter; declined to recuse himself after the improper ex parte communications with plaintiff's counsel; failed to require plaintiff to timely identify her claims and supporting evidence; and failed to postpone the arbitration to allow defendants sufficient time to prepare. In support of these claims, defendants cite partial "facts" in a one-sided manner and offer insufficient legal analysis of any given point. Defendants have not shown they established sufficient cause to postpone the arbitration hearing and were substantially prejudiced when Mr. Torres refused to do so. (§ 1286.2, subd. (a)(5).) Defendants also have not shown Mr. Torres failed to make any mandatory disclosure. It is defendants' burden on appeal to establish reversible error. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575; *Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.* (2008) 169 Cal.App.4th 340, 352; *Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1038.) This court will not develop defendants' arguments for them. (*Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co., supra,* 169 Cal.App.4th at pp. 351-352; *Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115-1116; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.)

IV. DISPOSITION

The judgment confirming the arbitration award is affirmed. Plaintiff, Jane Mayer, is to recover her costs on appeal jointly and severally from defendants, Joseph A. Weisz and Halina M. Karpinski.

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TURNER, P. J.

We concur:

ARMSTRONG, J.

KRIEGLER, J.